element arrangements contained in an approved interconnection agreement. Indeed, the more disaggregated the approach to MFN, the more effectively it will work to prevent discrimination and to lower the barriers to local entry. This is because each new entrant will likely require a different combination of checklist services for entry. Moreover, bundled offerings by the incumbent LEC may be in reality discrimination schemes in contravention of the statute. Thus, MFN should be implemented to allow competitors to pick and choose specific aspects of existing interconnection agreements to essentially create their own agreements.

Further, as the FCC acknowledged in its Interconnection Order, permitting carriers access only to entire agreements or only to large pieces of the agreement creates perverse incentives for the incumbent. For example, under such an arrangement, SBC would have the incentive to try to make each agreement unattractive to third parties by including onerous terms and conditions for a service that the other contracting party does not need. In essence, this practice would enable the incumbent to discriminate among competitive carriers in violation of the statute by ensuring that only the party to an agreement receives the benefits of that agreement.

Of course, the Eighth Circuit's stay pending appeal of the FCC's MFN rules has left the status of that provision uncertain just at the time when new entrants are planning their entry strategies and negotiating interconnection agreements. See Iowa Utils. Bd. v FCC, No. 96-3321 (8th Cir. Oct. 15, 1996). It should be noted that SBC has taken the view before the Eighth Circuit that the "pick and choose rule" is "contrary to the Act and should be overturned." See RBOCS/GTE Brief at 74. It has also insisted that its interconnection agreements contain terms that provide that the agreements must be modified to reflect any

gains the BOC achieves in the Court of Appeals. Even if the Commission could be confident that a truly disaggregated MFN obligation could be fully enforced, that alone would not suffice to achieve the goals of Sections 251 and 271. If it is to succeed fully in its stated mission to facilitate competition and not just competitors, the Commission must ensure that interconnection and access be available, on a non-discriminatory basis, in a variety of ways to a variety of competing firms.[23]

C. SBC's Inability To Demonstrate Electronic Bonding Deployment Renders Its Application Defective.

The FCC required that electronic bonding be achieved as a prerequisite for Section 271 compliance. Interconnection Order, Second Reconsideration at ¶ 11. As described in the attached affidavit of Cynthia Meyer, Sprint's Director of Local Market Development, it has not yet been achieved. Indeed, the OSS implementation schedule submitted by SBC as part of the OCC/AT&T arbitration expressly contemplated that it would not be until July 1997 that certain aspects of OSS would be made available.[24]

Ms. Meyer notes that SBC's "interfaces have not been tested for CLEC services" and that "the only ones that have the potential for full operational parity are EDI and electronic bonding, [n]either [of which] is operationally available today with [SBC]." (Meyer Aff. ¶¶ 15 & 17). SBC apparently does not disagree, stating that "[t]o date, no CLECs are using on a

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[23] The Commission is certainly aware that with respect to interconnection issues, one size does not fit all. For example, one agreement that purports to meet each item of the checklist is not sufficient if it in fact fails to provide, on reasonable and nondiscriminatory terms, certain items that may have been irrelevant to one competitor but are crucial to others.

[24] The schedule was an attachment to the Report and Recommendation Of the Arbitrator, PUD # 96-0000218 (Nov. 13, 1996). Sprint notes that SBC filed the Order, but omitted the attachment in its filing before the FCC.

'live' basis any of the electronic interfaces [SBC] makes available for pre-ordering, ordering/provisioning, maintenance/repair, and billing." (Ham. Aff. ¶45; Lowrance Aff. ¶ 11). SBC contends that it "provides CLECs with a choice of three electronic interfaces for access to its OSS ordering/provisioning capabilities." (Ham Aff. ¶ 27). Yet, one, EASE, is limited to business customers with thirty or less lines (Ham Aff. ¶ 28); a second, EDI, supports only "certain network elements" and is only "now available for testing by CLECs." (Ham. Aff. at ¶¶ 29-31); the third, LEX, is still "being developed" and will not "be available for use by CLECs [until] the second quarter of 1997." (Ham Aff. at ¶ 32). As noted by Ms. Meyer, critical competition issues are raised by the fact that SBC has yet to build certain automated systems and interfaces including those needed "for unbundled network element and interconnection orders," still others are either untested or unused, and, in any event, many interfaces lack industry standards such as for pre-order activity. (Meyer Aff. ¶¶ 13, 21-29). Without parity on these functions, CLECs are severely disadvantaged.[25]

In addition to the lack of availability, one cannot know whether SBC's interfaces will function on an industry-wide basis because (1) most national OSS standards are still being developed (Ham Aff. ¶ 47) and (2) "no CLECs are using, on a live basis, any of the electronic interfaces [SBC] makes available for pre-ordering, ordering/provisioning, maintenance/repair, and billing."[26] (Ham Aff. ¶ 45, Lowrance Aff. ¶ 11, Kramer Aff. ¶ 14). Since no carrier is

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[25] According to Ms. Meyer, "there is no area of OSS interface functionality that meets Sprint's requirements for operational parity and in fact, the most optimistic date that [such] parity . . . can be attained is probably late 1998." (Meyer Aff. ¶ 27). That statement is borne out by the many deficiencies AT&T has observed with SBC's OSS offerings. See AT&T Comments, Vol. 4, Tab 21.

[26] Brooks Fiber notes that because of the collocation "hurdles" SBC has placed in its way, Brooks has not yet advanced to the next hurdle, use of SBC's "ordering, provisioning, maintenance and related support systems." Brooks Comments at 11, Vol. IV, Tab 23.

using the system, it is impossible for Sprint to determine whether the interfaces work at all, let alone whether they provide operational parity with SBC.[27]

The need for such verification is amplified because SBC is only now beginning to "design" and "test" the OSS interfaces which will be used by Sprint and other CLECs. (Meyer Aff. ¶¶ 11, 20 & 27). SBC has not "indicated to Sprint that any OSS interface processes are fully documented or tested (with the exception of facsimile)." (Id. ¶ 28). Indeed, SBC's March 17, 1997, status report filed with the Texas PUC concerning OSS states that SBC has not completed internal testing on several electronic interfaces such as the ordering and provisioning of directory listing changes and that other interfaces --including a critical interface for ordering unbundled elements -- are yet to be tested by CLECs and will not be available until June 1997.[28] Consequently, it is a safe assumption that SBC's OSS interfaces for Oklahoma suffer similar defects. Indeed, SBC admits that it did not start testing one of its OSS interfaces until April 1, 1997. (SBC Reply Comments, at 37, Vol. IV, Tab 27). Furthermore, AT&T, which has been accessing some SBC OSS systems (Ham Aff. ¶ 45) has submitted numerous complaints about SBC's electronic interfaces including the failure to provide OSS electronic interfaces for unbundled network elements, the lack of parity between the interfaces offered CLECs compared to those used by SBC for itself, and the lack of system capacity. (Dalton Aff., passim). Given the above, SBC's application is defective and must be

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[27] AT&T's filing before the OCC contained several examples showing that the OSS interfaces being provided by SBC were not comparable to those used by SBC for itself. See Dalton Aff. ¶¶ 86-91, attached to AT&T Comments, Vol. IV, Tab 21.

[28] The Texas example is particularly apt given that SBC has told the OCC that much of its efforts in Texas are designed to create an "agreement that is transferable to Oklahoma." See SBC Reply Comments, at 29 n.31 (March 25, 1997), Vol. IV, Tab 27.

denied.[29]

D. SBC's Refusal To Provide Route Indexing Violates Its Obligation To Provide Interim Number Portability.

In the First Report and Order on Number Portability (¶ 115), the Commission held that "BOCs must comply with the requirements set forth in this Order, including the requirement to provide currently available measures in order to satisfy the BOC competitive checklist." As set forth in that Order (¶ 114), the "currently available" obligation requires BOCs to provide "currently available number portability measures as soon as reasonably possible upon [ ] request from another telecommunications carrier." In accordance with Section 251(b)(2)'s requirement that number portability must be provided to the extent technically feasible, the Order (¶ 115) also mandated that "when a number portability method that better satisfies the requirements of section 251(b)(2) than currently available measures becomes technically feasible, LECs must provide number portability by means of such method." Thus, to satisfy the checklist, SBC must provide number portability by means of all currently available measures that are technically feasible. AT&T has repeatedly asked SBC to provide it with number portability using Route Index methods. (Lancaster Aff. ¶¶ 29-61, attached to AT&T Comments, Vol. IV, Tab 21). Route Indexing methods are certainly technically feasible; indeed, NYNEX routinely offers Route Indexing to competing service

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[29] See Interconnection Order ¶ 518 (If CLECs cannot use OSS functions in a manner similar to the BOC, CLECs "will be severely disadvantaged, if not precluded altogether from fairly competing."). SBC's implicit argument that ILEC-CLEC use of facsimile machines satisfies the FCC's OSS requirements would be comical if not so much of importance were at stake.

providers.[30] Although SBC promises to provide "network elements not specifically provided for in [its SGAT] . . . where technically feasible (Br. at 20) and has been ordered by arbitrators in both Kansas and Missouri to provide Route Indexing to AT&T,[31] SBC has nonetheless declined to provide Route Indexing in Oklahoma. In fact, SBC does not even mention that method as being available in either its brief, its SGAT, or in its affidavits.[32]

Moreover, the pricing for what SBC does provide is wholly unformed. Although SBC recites that it will recover the costs of providing interim number portability in a competitively neutral manner established by the OCC, Mr. Kaeshoefer's affidavit (at 28) admonishes:

> In the meantime, SWBT has entered into agreements to defer collection of charges from all requesting telecommunications carriers for the incremental costs of interim number portability and has requested proceedings before the OCC to determine a method of cost recovery for interim number portability. SWBT also proposes that all incumbent and new LECs keep track of their costs of providing such number portability. When the OCC approves interim recovery measures, SWBT will comply with those measures.

Not only have cost-based rates not been established, not even interim rates have been set. Nonetheless, liabilities will accrue to CLECs adventurous enough to proceed with this open-ended risk. Given this, SBC cannot be said in any meaningful way to have satisfied the number portability requirement of the checklist.

Sprint also notes that SBC's broad assertion that it will comply with full number

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30 See, e.g., NYNEX/MFS Agreement § 13.3 (describing procedures for providing interim number portability "[t]hrough Route Indexing"); NYNEX/Teleport Agreement § 13.3 (same).

31 See Lancaster Aff. ¶ 33, ¶ 56, attached to AT&T Comments, Vol. IV, Tab 21.

32 SBC provides interim number portability only through remote call forwarding and direct inward dialing on the grounds that those are the only two methods which the FCC found to be technically feasible in its Number Portability Order (¶ 110). See Deere Aff. ¶¶ 112-113; Kaeshoefer Aff. ¶¶ 57-59, Baker Oliver Aff. ¶ 15). As discussed, that position violates the FCC's Number Portability Order.

portability as required should not suffice for these purposes. While full number portability may not be required on the face of the statute, Section 271 requires that the application for interLATA authorization demonstrate "full compliance" with the regulations issued by the FCC to require full number portability. The FCC number portability regulations obligate SBC to implement number portability in Oklahoma City within the Third Quarter of 1998 and Tulsa by the Fourth Quarter of 1998. SBC's otherwise expansive filing is noticeably lacking any information on the steps it has taken to date to ensure its timely compliance with these mandates.

The necessary arrangements for full number portability will not be accomplished overnight; it can be reasonably expected that SBC would currently be deploying considerable resources to ensure that its regulatory obligations are met on time. However, SBC has not given the FCC or the public any assurance here that any of this is the case save for a rote recitation that it will deploy full number portability in the state.[33] SBC should be required to submit comprehensive reports demonstrating its on-target progress as a critical part of credible checklist compliance. That is especially critical here given Brooks Fiber's statement that almost every one of its customers has encountered problems with SBC's interim number portability. (Brooks Comments at 4, Vol. IV, Tab 23).

E. SBC's Pole Attachment Offerings Do Not Comply With The Checklist.

SWBT's pole attachment strategy violates some of the most fundamental aspects of the Commission's pole attachment requirements, endangering the emergence of facilities-based

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[33] See SBC Brief at 37 ("Implementation of permanent number portability is scheduled to begin in Oklahoma in the third quarter of 1998.")(emphasis added); Kaeshoefer Aff. ¶ 59 (same); Baker-Oliver Aff. ¶ 21 (same).

competition by restricting access and raising the costs of facilities-based competitors. While the Hearst Affidavit and the Master Agreement ("M.A.") reveal numerous problems, the more egregious and straight-forward examples are listed below.

- SWBT conditions access on the execution of a written agreement, (M.A. at Art. 9.01; 9.02) in violation of the Interconnection Order (¶ 1160) which states that a "utility's obligation to permit access . . . does not depend upon the execution of a formal written attachment agreement with the party seeking access").

- SWBT has broadly asserted the right to force attaching entities to bear the costs of rearrangements made necessary by SWBT's own business needs (Hearst Aff. at 12-13) even though the Interconnection Order (¶ 1213) expressly limits such to those instances where an attaching party takes affirmative steps to benefit from the rearrangement.

- SWBT intends to utilize an application process by which it appears it will be able to reserve space for its telecommunications operations (Hearst Aff. 8; M.A. at Art. 8.02.), yet the Interconnection Order (¶ 1170) prohibits reservation of space by an ILEC for local exchange service to the detriment of a would-be local service entrant.

- SWBT unreasonably requires an attaching entity to configure its network so as to minimize the need for access to SWBT's poles or conduit system. (M.A. at Art. 6.02).

- SWBT intends to charge numerous "side-fees"[34] which impose uncapped costs on attaching entities beyond the maximum amounts allowable under Section 224.

- SWBT will exercise its eminent domain authority only if the party seeking access does not have its own eminent domain authority. (Hearst Aff. 24-25.) The Commission considered and rejected this position.[35]

- SWBT requires "make-ready work" to be performed by SWBT technicians (with a limited exception for circumstances in which SWBT is unable to complete the necessary work within the time frame desired by the attaching entity) and intends to bill

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[34] See Hearst Aff. at 14-15; M.A. at Art. 19 (assessing costs on attaching entities for, inter alia, mandatory make-ready work, personnel costs for making records available, copying costs, contract administration fees, pre-license survey fees, license fees, transfer of control fees, record-keeping fees, etc.).

[35] See Interconnection Order at ¶ 1181 ("[w]e believe a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments").

attaching entities for these mandatory services.[36] This squarely conflicts with the Interconnection Order's statement (¶ 1182) that "[a]llowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers" and unnecessarily raises the costs of attaching entities while impeding their control over the quality of the work completed.

- Similarly, if the attaching entity performs its own work on SWBT's facilities, SWBT unreasonably requires that an SWBT authorized employee or representative be present to observe and requires the attaching entity to pay costs attributable to such observation. (M.A. at Art. 6.11(b) and (e)).

- SWBT fails to certify that it will comply with the requirement that it impute to itself or to its affiliate the pole attachment rate it would be charged were it a non-affiliated entity.[37]

SBC's pole attachment arrangements constitute flagrant violations of its obligations under Section 251, and are alone grounds for not only dismissal of its applications but FCC enforcement action as well.

III. SBC FAILS TO DEMONSTRATE THAT IT WILL PROPERLY COMPLY WITH THE SEPARATE AFFILIATE SAFEGUARDS OF SECTION 272.

Section 271(c)(3) requires the Commission to find that the application complies with the requirements promulgated under Section 272. That section implements statutory safeguards designed to decrease BOCs' opportunities to commit anticompetitive acts. The affidavits submitted by SBC[38] to demonstrate Section 272 compliance instead show the opposite: in many instances, the affidavits deviate from the express terms of the Commission's Non-Accounting Safeguards Order in ways that would have anticompetitive

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[36] See Hearst Aff. at 27 ("SWBT will be responsible for make-ready work and the Applicant will pay for the performance of that work."); M.A. at Arts. 10.04, 10.05.

[37] See Interconnection Order at ¶ 1157 (requiring imputation).

[38] For purposes of brevity, statements made in the affidavits are attributed to SBC regardless of whether they were filed by Southwestern Bell Telephone, Nevada Bell or Pacific Bell.

results. In other instances, the affidavits quote the language of the Non-Accounting Safeguards Order but have either a notable omission or addition. It is unclear whether these omissions or additions manifest a deliberate attempt to evade the agency's requirements or simply evidence SBC's carelessness in reciting its statutory obligations. Assuming the latter, SBC's carelessness in *reciting* its statutory obligations calls into question the care with which it may *perform* those obligations.

To begin with, the affidavits demonstrate SBC's disregard for the Commission's inbound marketing rules (Non-Accounting Safeguards Order at ¶ 292) which require a BOC to inform any customer who orders new local exchange service that the customer has a choice of interLATA carriers and to provide that customer "with the names and, if requested, the telephone numbers of all of the carriers offering interexchange services in its service area." This rule -- which requires SBC to provide the names of IXCs regardless of whether a customer requests such information -- is designed to prevent BOCs from favoring their interLATA affiliates by omitting the names and numbers of competing IXCs. Yet, SBC's affidavits state clearly that SBC will provide the names only upon request.[39] Such flouting of the Commission's rules is grounds for rejection of SBC's application.

SBC narrowly construes the nondiscrimination requirements established in the Non-Accounting Safeguards Order to the point of noncompliance. For example, the affidavits commonly limit the availability of rates, terms, conditions, or services to "similarly-situated carriers" when neither the Non-Accounting Safeguards Order nor Section 272 restrict

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[39] See, e.g., Ham Aff. at 18 ("SWBT will inform any customer who orders new local exchange services on an inbound call that it has a choice in long distance carriers, and on request will inform these customers of the names and the telephone numbers of carriers offering interexchange services in its service area").

availability to carriers which are "similarly situated."[40] Despite otherwise quoting the language of the Non-Accounting Safeguards Order, the affidavits notably omit the requirement that negotiations between SBC and its Section 272 affiliate occur on a nondiscriminatory basis.[41] Those nondiscrimination standards are the sine qua non of common carrier status and one of the central safeguards underlying the BOC affiliate provision of interLATA services. As such, the Commission should ensure SBC's strict compliance with rules designed to prevent discriminatory behavior.

Likewise, SBC's affidavits omit repeatedly any mention of compliance with the disclosure requirements of Section 272(b)(5) and the Non-Accounting Safeguards Order.[42] SBC must reduce affiliate agreements to writing and make them available for public inspection.[43] Non-Accounting Safeguards Order ¶¶ 193, 286. That omission is especially

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[40] See, e.g., id. at 9, 13 (limiting the availability of administrative, non-joint marketing services to "similarly-situated non affiliates"); see also id. at 18 (limiting the availability of interLATA or intraLATA facilities or services to "similarly situated telecommunications carriers").

[41] See, e.g., Gueldner Aff. at 5 ("SBLD may negotiate with PB on an arms-length basis to obtain transmission and switching facilities from PB, to arrange for collocation of facilities, or to provide or to obtain services [other than those expressly prohibited]"); see also Riley Aff. at 5.

[42] See Ham Aff. at 12 (stating that joint marketing service agreements will comply with arms-length requirements, but fails to specifically mention the need for written agreements or public inspection opportunities).

[43] The Commission's insistence on strict compliance with disclosure of affiliate transactions is particularly important in the case of SBC, which has a history of failing to adhere to affiliate transactions rules. As the Commission's February 7, 1997 Consent Decree Order noted, a 1994 federal/state joint audit report conducted for NARUC concluded that the affiliates' dealings with SWBT were not in full compliance with the affiliate transactions standards.

troubling because of its serious consequences: it deprives competitors of a critical monitoring capability without which anticompetitive behavior may go undetected.[44]

The affidavits offer a vague standard for processing PIC change requests by merely committing to avoid discrimination between the Section 272 affiliate and unaffiliated entities. See, e.g., Ham Aff at. 12. By contrast, the Non-Accounting Safeguards Order (¶ 240) requires BOCs to process PIC change orders within a period of time that is "no greater than the response time it provides to itself or its affiliates." The Commission's specific standard is easy to apply and will not tolerate anticompetitive attempts to justify delays in processing unaffiliated IXC PIC change requests. SBC must adhere to this standard.

Finally, the affidavits contain a number of other notable deviations from the requirements of the Commission's Non-Accounting Safeguards Order:

- If a BOC permits its 272 affiliate to sell or market the BOC's telephone exchange services, it must permit other entities offering similar services to do the same under the same terms and conditions. (Non-Accounting Safeguards Order ¶ 286). While the affidavits acknowledge that other entities must be permitted to sell or market SBC's telephone exchange services in these circumstances, they fail to mention that the sale or marketing must be permitted under the same terms and conditions as are provided to the 272 affiliate. (Bernard Aff. at 9; Sweitzer Aff. at 17).

- The affidavits indicate that the 272 affiliates have interexchange switches on leased SBC premises and that SBC has offered "comparable leasing arrangements in writing to SBLD's future competitors on non-discriminatory terms and conditions." (Ham Aff. at 6.) That statement does not comply with the Non-Accounting Safeguards Order's (¶ 202) requirement that the BOC offer these arrangements to unaffiliated entities at the same rates, terms, and conditions as those offered to the affiliate.

- The Order (¶ 178) is most naturally read to prohibit any director, officer or employee of a BOC to simultaneously hold the position of director, officer or employee at the Section 272 affiliate, and vice versa. However, the affidavits merely restrict an SBC director from

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[44] For example, the Non-Accounting Safeguards Order (¶ 296) noted that what constitutes legitimate "joint marketing services" will be determined on a case-by-case basis. Without the disclosure obligations, Sprint and other competitors will be bereft of the primary mechanism for reviewing such agreements.

simultaneously serving as a 272 affiliate director but not from simultaneously serving as a 272 affiliate officer or employee. (Bernard Aff. at 8; Riley Aff. at 6). The same leniency is shown for officers and employees. The potential for subversion of structural separation requirements is self-evident.

- The affidavits indicate that SBC will provide unaffiliated carriers with the "same" exchange access, interconnection, collocation, unbundled network elements, and resold services" provided to the 272 affiliate on non-discriminatory rates, terms, and conditions. (Ham Aff. at 13.) The Section 251 standard for these services is not "sameness," but rather "equal in quality." This distinction was highlighted in the Non-Accounting Safeguards Order. (¶¶ 203-204) The Commission must prevent the degradation of the standards established in its Local Competition Order.

- The affidavits claim that "telecommunications services" and network elements will be provided to the 272 affiliate using the same service parameters, interfaces, etc., as used to serve other carriers and retail customers. (Ham Aff. at 13). The Non-Accounting Safeguards Order (¶ 217) does not limit this requirement to "telecommunications" services, and it requires these services to be provided to non-affiliates at the same rates, terms, and conditions as they are provided to the 272 affiliate (¶ 202), a requirement omitted by the affidavits. (Ham Aff. at 13.)

- SBC claims it will charge its 272 affiliate, or impute to itself, rates for telephone exchange service and exchange access that are no less than the rate charged to any unaffiliated IXC for such service, *taking into account the comparability of the service*. (Ham Aff. at 17). The Order does not provide for a BOC to "take into account the comparability of the service" (¶ 256), a practice which would allow SBC too much discretion.

As shown, SBC has failed to show compliance with Section 272 in a number of ways. Whether done out of deceit or sloppiness, the deficiencies alone warrant dismissal of the application.

IV. THE APPLICATION IS INCONSISTENT WITH THE PUBLIC INTEREST.

Congress determined that no BOC should be allowed entry into the interLATA market within its region until it has relinquished its monopoly stranglehold over the local exchange markets on a state-by-state basis. Since this has not been done in Oklahoma, it would violate the public interest to permit SBC in-region, interLATA relief in that State.

The reasons for this are multifold. To allow BOC entry prematurely would be to

forego the anticipated benefits that would flow from local telephone competition, and would diminish if not eradicate the extant consumer benefits of today's competitive long distance markets. Further, the carrot of interLATA entry is the legislative incentive which has been given to a BOC to cooperate in opening its local monopoly. Absent holding out this inducement, no BOC would rationally relinquish its bottleneck and voluntarily aid in bringing about competition.[45] The readily observable conduct of GTE in the wake of efforts by this Commission to establish competitively neutral rules for interconnection, demonstrates this point succinctly.[46]

Moreover, this inducement to cooperate must be used to enable competition throughout the area in which interLATA authority is sought; by the terms of the statute this is state-wide. Here, SBC has pointed to only a scrap of activity in a relatively small area. Certainly, granting BOC statewide entry where it still controls bottleneck facilities in all major markets within the state of Oklahoma cannot be consistent with the public interest.

A. The Commission has Expansive Powers Under the "Public Interest" Section of 271.

SBC observes that "Congress intended to incorporate prior Commission precedent by using the phrase 'public interest, convenience, and necessity.' " (Br. at 53). SBC errs by interpreting such precedent as permitting the Commission to focus on the public interest

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45 See Shapiro Declaration at 3. As the FCC has found:

> incumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services.

FCC Interconnection Order ¶ 55.

46 See "Holding the Line on Phone Rivalry, GTE Keeps Potential Competitors, Regulators' Price Guidelines at Bay" Washington Post, October 23, 1996, at C12.

through only the narrow prism of SBC's entry into the interLATA market. The public interest has never been construed so narrowly. The Supreme Court has characterized the public interest standard as a "supple instrument" granting broad powers to the FCC.[47] Those powers, the Court said, dispense "broad" authority to the FCC to act as an "overseer" and "guardian" of the public interest.[48] Courts are thus required to give "substantial judicial deference" to the Commission's "judgment regarding how the public interest is best served."[49]

The FCC thus has considerable authority to examine and weigh factors outside the precise terms of the statute. While it cannot act inconsistently with the statute, and thus cannot "limit or extend" the terms of the checklist, the FCC remains free to consider all relevant circumstances and further, to resolve the ambiguities and fill in the interstices left by Congress.[50] This is indeed its obligation.

B. SBC's Purported Public Interest Benefits Are Simply Conclusory Allegations Entitled To No Weight.

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47 See Federal Communications Commission v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981) quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)(the public interest "serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy"); see also National Broad. Co. v. United States, 319 U.S. 190 (1943) (holding that "public interest" confers broad powers upon the FCC); Public Utils. Comm'n of Cal. v. FERC, 900 F.2d 269 (D.C. Cir. 1990)("public interest" standard grants broad powers to FERC).

48 See CBS v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973); see also National Cable Television Ass'n v. United States, 415 U.S. 336, 341 (1974)("There is no doubt that the main function of the Commission is to safeguard the public interest.").

49 See WNCN Listeners Guild, 450 U.S. at 596 (citing cases).

50 Although extensive, the "public interest" standard is of course not limitless; the Court has held that the public interest does not give administrative agencies a "broad license to promote the general welfare." See NAACP v. FPC, 425 U.S. 662, 669 (1976). Rather, the exact shape and breadth of an agency's public interest authority varies with the aims and goals of the statute in which the public interest provision is lodged. Id. at 670 (the public interest derives its "content and meaning" from "the purposes for which the Act[ ] [was] adopted"); Public Utils. Comm'n of Cal., 900 F.2d at 281 (same).

SBC argues that its entry into the long distance market would be beneficial to consumers because, it asserts, the interLATA market is not performing competitively. SBC relies upon a number of affidavits as well as published papers for this most counterintuitive proposition. All this paper culminates in a truism: garbage in-garbage out.

All of the papers upon which SBC's implausible assertion is based rely fundamentally upon false factual assumptions. As the attached analysis, "Flaws in the Public Interest Analysis of SBLD InterLATA Entry" (Attachment C) demonstrates, SBC's papers use the wrong numbers and thus produce the wrong conclusions. For example, Dean MacAvoy tried to track price-cost margins to see if margins declined over his study period. The data he was given are useless, however. They greatly overstate the actual prices charged by the interexchange carriers, most especially in later years by ignoring the most popular and competitive products offered. The Affidavit of Professor Kahn and Tardiff erroneously build on MacAvoy's faulty foundation.

These and other errors irretrievably erase any legitimate basis for SBC's proffered analyses. Sprint notes that these affidavits bear a heavy burden in that they ask us to disbelieve what common sense would tell us in the first place: there is currently robust competition in the interLATA market. Because SBC's entry at this time portends only inefficient, anticompetitive entry, SBC's inflated claims that the local economy would greatly benefit from Section 271 grant can be true only in the very limited case of SBC shareholders. SBC customers and competitors, however, will predictably suffer.

C. Predictable Harm To The InterLATA Market Is Alone Sufficient Reason To Deny the Application.

Without adequate competition established at the local exchange level, there will be no market disciplining effect on SBC to refrain from anticompetitive conduct in the interLATA

market. The absence of such restraining effects is particularly troubling given that SBC apparently (and recently) has flouted the FCC's accounting rules and violated the antitrust laws as evidenced by the fact that it entered into settlement agreements on both scores.[51] Although SBC contends that it has "absolutely no ability to impede competition," (Br. at 73), both discrimination and cross-subsidization remain serious threats to the competitive interLATA market.

1. Discrimination Is A Predictable Consequence Of SBC's Entry.

As described by the FCC's Chief Economist Joseph Farrell:

> The BOCs' incentives and ability to discriminate against rivals in long-distance -- to take the most prominent example of MFJ prohibitions -- depend on their market power in the local bottleneck. If we can open up the bottleneck and implement vigorous competition there, then BOCs will have little or no incentive to raise the costs of their long-distance partners -- and if they do so, those long-distance carriers and their customers will have other choices, so the harm to consumers will be limited. Thus, when there is enough competition in what is now the local bottleneck, it will make good sense to let the BOCs into complementary businesses such as manufacturing and long distance.[52]

While regulators will try to monitor for this type of misconduct, the anticompetitive opportunities available to SBC will be substantial. It need only adversely adjust any one of large numbers of access "details" and thereby seriously disrupt the interLATA market.

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[51] In February of 1997, SBC entered into a consent decree with the FCC relating to the fact that "accounting practices employed by SWBT and its affiliates . . . appeared to be inconsistent with the Commission's rules." See Southwestern Bell Tel. Co., FCC 97-9, 1997 WESTLAW 52178 (rel. Feb. 7, 1997). Even more worrisome is the Fifth Circuit's holding that in Texas, SBC's directory affiliate had violated the antitrust laws in "attack[ing]" its competitors. See Great Western Directories v. Southwestern Bell, 63 F.3d 1378 (5th Cir. 1995), affirmed in part, vacated in part, and remanded for a new determination of damages, 74 F.3d 613 (5th Cir. 1996), vacated by settlement of the parties (Aug. 8, 1996).

[52] See Farrell, Joseph, Creating Local Competition, 49 Fed. Comm. L.J. 201, 207-08 (Nov. 1996).

SBC could also mask its behavior in ways that will be difficult to remedy: "These problems are hard to regulate away, because the withdrawal of cooperation from rivals may be subtle, shifting, and temporary, but yet have real and permanent effects. . . ."[53] And so long as regulation prevents SBC from fully exploiting its market power, it retains an incentive to earn those rents in adjacent markets through discriminatory activity.

2. The Likelihood Of Cross-subsidization Is Evident.

Contrary to SBC's contention, (Br. at 74-77), regulation has also not materially diminished either its incentive or its opportunity to cross-subsidize its in-region interLATA telecommunications service. Under both the FCC's price cap scheme and rate-of-return regulation, which SBC is currently subject to in Oklahoma,[54] SBC has regulation-induced

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[53] See id. at 207. See Shapiro Declaration at 7-8.

[54] SBC only indirectly admits that it is currently subject to rate-of-return regulation in Oklahoma, noting that the OCC has undertaken to respond to the "major changes" brought about by the 1996 Act through "appropriate regulatory reforms," including the "possible departure from traditional rate regulation in favor of price caps or other incentive regulation." See Brief at 77. However, as indicated in the Additional Comments of Cody L. Graves, (p.3), Chairman, Oklahoma Corporation Commission, on the Application of SBC Long Distance for Provision of In-Region InterLATA Services in Oklahoma, the OCC considers rate regulation an important tool to ensure that SBC acts lawfully:

> Unlike some states that may have dealt away their trump card of rate base/rate of return regulation, the OCC has to date retained full regulatory authority over our incumbent local exchange companies (ILECs). We have in the past and will continue in the future to use all of our authority to open local markets to competition.

Moreover, the transcript of the Commissioners' comments at the April 25 hearing before the Commission en banc referred to legislation pending before the Oklahoma legislature which would seek to immediately remove companies like SBC from rate base/rate-of-return regulation. See e.g., April 25, 1997 Transcript at p. 7, wherein Commissioner Graves refers to the legislation and states that the fact that the legislation would seek to immediately remove companies from rate base/ rate-of-return regulation is one of the primary reasons that he opposes the legislation. See id. at p. 34, where Commissioner Apple states that he opposes the bill "in the strongest terms." There is no indication in

incentives to engage in inefficient misallocation of costs. Under both regulatory regimes as implemented, there is an explicit link between reported costs and permitted prices. [55] Therefore, federal and state regulation give SBC the incentive to misallocate costs from competitive services to the noncompetitive side.

Routine examination of BOC costs is still a large part of the FCC's regulatory activities. The periodic adjustments of productivity factors and the attending reliance upon an examination of ILEC annual cost reports, provides an example of the "feedback mechanism."[56] The link between costs and rates retains SBC's incentives to incur costs in order to avoid rate decreases or productivity factor increases.

SBC's incentives to cross-subsidize are illustrated in a number of ongoing FCC proceedings examining BOC costs. For example, in the Commission's Access Charge Reform Rulemaking, access charge rates are being reevaluated by determining the costs of interstate

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this record whether the legislation would include any safeguards to prevent cross-subsidization. However, the record seems clear that the Oklahoma Commission believes that rate of return regulation is preferable to the alternative contained in the pending legislation. Further, because this legislation is still pending, it is unclear at this point whether SBC will be subject to any regulatory safeguards in the future at the state level, including the "trump card of rate base/rate of return regulation" relied upon by Commissioner Graves.

[55] From its inception, the FCC's price cap plan recognized that "any price cap plan must assur[e] just and reasonable rates. . ." Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, *Second Report and Order*, 5 FCC Rcd 6786, 6801 (1990).

[56] See Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, *First Report and Order*, 10 FCC Rcd 8962 at ¶ 156 (1995)(reviewing LEC costs of providing service in setting the X-Factor). It should be noted that SBC recently elected the Commission's 4.0% X-Factor under which it has significant sharing obligations for earnings above a 12.25% rate of return. See Letter From Nancy Wind, SBC Area Manager, to William F. Caton, FCC Acting Secretary at 3.C (April 2, 1997). Such sharing obligations only heighten the relevance of the BOC's costs to its revenues.

access services.[57] Similarly, in the Universal Service Rulemaking, the FCC is considering the extent to which reimbursement will be based on actual ILEC costs, as SBC has argued that it should.[58] Because ILECs will continue to serve the vast majority of local subscribers, they will benefit the most from higher cost showings through greater reimbursements. Thus, SBC, as a price cap-regulated ILEC, will retain incentives to artificially absorb costs into noncompetitive service accounts due to the continuing relevance of costs to its rate levels.

SBC would have the Commission believe that, despite the inefficient incentives created by the federal and state regulatory regimes to which it is subject, the FCC's structural and accounting safeguards eliminate any opportunity to act on these incentives. (Br. at 74-76; Gordon Aff. at 16). This is simply not so. First, the Commission explicitly acknowledged in its Non-Accounting Safeguards Order that its rules leave BOCs with opportunities to misallocate the costs of their Section 272 affiliates.[59] Far from requiring complete separation

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[57] See Access Charge Reform, CC Docket No. 96-262, *Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry*, FCC 96-488 at ¶¶ 260-265 (released Dec. 24, 1996)(proposing possible mechanisms to enable ILECs to recover embedded and forward-looking costs of interstate access). The pricing flexibility proposed in the Access Charge Reform Notice would further SBC's ability to shift costs without detection. Id. ¶¶ 168, 180-200. In addition, the upcoming separations reform proceeding likely will involve an examination of ILEC costs. Id. ¶ 6.

[58] See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Comments of Southwestern Bell Telephone Company* at 13-14 (filed April 12, 1996)(the universal service subsidy should be set at "the difference between the [incumbent LEC's] historical cost of providing universal service and the actual revenues collected for such service").

[59] In establishing the structural safeguards applicable to BOC Section 272 affiliates, the Commission balanced the inefficient incentives with the increased economies of scale and scope created by the integration of BOCs and their affiliates. As the Commission explained,

> [w]e believe it is consistent with both the letter and purposes of section 272 to strike an appropriate balance between allowing the BOCs to achieve efficiencies within their corporate structures and protecting ratepayers against improper cost allocation and competitors against discrimination.

of BOCs and their Section 272 affiliates, the Commission permitted substantial integration. For example, the Commission permitted sharing of marketing and administrative services and the offices and equipment associated with those activities.[60] The Commission also permitted the operating company and its Section 272 affiliate to obtain services from the same outside suppliers. Non-Accounting Safeguards Order at ¶ 184.

Second, to the extent that the Commission concluded that other aspects of its regulatory regime provided adequate protection against the abuse of this integration, it relied on the presence of price cap regulation.[61] As stated, most of the SBC incumbent LEC rate base is subject to Oklahoma's traditional rate-of-return regulation. Thus, a key assumption upon which the FCC relied in the Non-Accounting Safeguards Order is inapplicable in Oklahoma.

Finally, as evidenced by the consent decree explained above, SBC has failed in the past to comply with the very accounting safeguards it claims will prevent cross-subsidy. Given its massive size (especially now combined with Pacific Telesis), there is every reason to believe that future compliance will be exceptionally difficult for regulators to police. Nor should there be any question about SBC's willingness to continue its disregard of the Commission's

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Non-Accounting Safeguards Order at ¶ 167. See id. ¶ 168 ("we believe the economic benefits to consumers from allowing a BOC and its section 272 affiliate to derive the economies of scale and scope inherent in the integration of some services outweigh any potential for competitive harm created thereby. Therefore we permit the sharing of administrative services and other services.").

[60] See id. ¶ 178. In doing so, the Commission stated that "[w]e recognize that allowing the sharing of in-house services will require a BOC to allocate costs of such services between the operating company and its section 272 affiliate and provide opportunities for improper cost allocation." Id. at ¶ 180.

[61] See id. ¶ 181.

competitive safeguards. As again explained above, SBC's 272 "compliance" showing at best shows a startling indifference to the structural safeguards adopted by the Commission.

3. Access Charge Reform Is A Prerequisite To Entry

Additionally, interLATA entry cannot be authorized until access reform is undertaken and implemented. Competition cannot produce the hoped for efficiency gains for consumers if regulation continues to distort the market. The Commission has appropriately recognized the problems with the access charge rate structure imposed by Part 69, but has yet to remedy them. The Commission has further acknowledged that current access charge levels greatly exceed costs.

The inflated access charges that Sprint and other IXCs must pay over to SBC and to other BOCs create indisputable problems if the latter are allowed to compete for interLATA business. SBC has a clear, artificial cost advantage in obtaining the access services essential to the provision of interLATA services.

SBC will be able to compete for additional toll calling by imputing the true cost of access; everyone else will be forced to the competitive disadvantage of including the inflated access costs charged by SBC. This advantage is by no means rectified by regulatory requirements of separate subsidiaries and imputation, since economic judgments will be made for the enterprise as a whole. And, of course, this artificial advantage multiplies by two for calls that both originate and terminate within the SBC-Pacific Telesis region.

* * *

The opportunities for SBC to discriminate and cross-subsidize hurt not only competitors, but consumers who otherwise reap the benefits of the competitive process. Local ratepayers are forced to subsidize the competitive ventures of the BOCs. Even if SBC's rates

do not increase, the competition that would have driven costs down (and, in the end, prices) is absent. Second, consumers of competitive interLATA services are saddled with less efficient products and services because the market share of more efficient firms has been displaced by SBC -- not by better service but by misconduct.

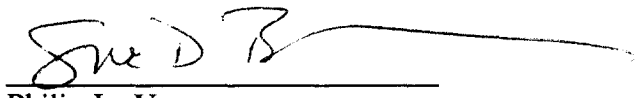
One would think by now the BOCs would have tired of repeating their old but false premise that the long distance market does not perform competitively. The FCC's policies and findings of a competitive long distance market stem back three decades. No matter how esteemed the reputations of its consultants, the SBC submission cannot defeat the competition that can be observed daily by turning on the television, opening a newspaper, or more to the point, making a long distance call. It is simply insulting for SBC to continue to insist on its Alice-in-Wonderland world in which local markets are competitive and long distance markets are not.

CONCLUSION

For the foregoing reasons, SBC's application must be denied.

Respectfully submitted,

SPRINT COMMUNICATIONS COMPANY L.P.



Philip L. Verveer
Sue D. Blumenfeld
Michael F. Finn
Thomas Jones
Gunnar D. Halley

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ITS ATTORNEYS

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ATTACHMENT A